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No.

Supreme Court, U.S.
FILED
DEC 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ETIENNE BOERENVEEN,

Petitioner,

– against –

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Questions Presented For Review

1. Does issuance of a visa titled "Diplomatic" by the United States to the representative of a foreign sovereign who qualifies for it entitle that representative who relies on issuance of the visa to diplomatic immunity?

2. Do *United States v. Inadi*, 106 S.Ct. 1121 (1986), *United States v. Bourjaily* 107 S.Ct. 2775 (1987), and the Compulsory Process Clause of Amendment VI, *United States Constitution*, require something more than mere judicial discretion in deciding a motion for severance by a defendant against whom *FRE* 801(d)(2)(e) conspirator statements are to be offered?

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Jurisdictional Statement

The jurisdiction of this Court is invoked pursuant to Section 1254 of Title 28, *United States Code*, and Rule 21 of the *Rules of this Court*, to review by writ of certiorari the judgment of the United States Court of Appeals for the Eleventh Circuit dated September 23, 1987, rehearing denied October 27, 1987, affirming a judgment of the United States District for the Southern District of Florida entered November 17, 1986. The mandate issued on November 6, 1987.

Constitututional Provision & Regulations

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ." Amendment VI, *United States Constitution*

> "A non-immigrant alien . . . in possession of a diplomatic passport or its equivalent shall, if otherwise qualified, be eligible to receive a diplomatic visa irrespective of his classification under Section 41.12." 22 CFR Section 41.102(a).

> "The format of the diplomatic visa shall be the same as a regular non-immigrant visa except that it shall bear the title 'diplomatic'." 22 CFR Section 41.124(d)(2)

Statement of the Case

Petitioner Etienne Boerenveen, a Suriname national, a graduate of the Royal Dutch Military Academy, one of five members of Suriname's Military Authority and Chairman of Suriname's Fisheries Commission, was convicted with one Cilvion Heymans and Heymans' son, Ricardo, of conspiring to violate the Travel Act (18 *USC* 1952(a)(2)) and conspiring to import and distribute cocaine. (21 *USC* 963)

In the Fall of 1985 an Agent of the United States Drug Enforcement Administration, acting in an undercover capacity, sought to purchase cocaine from Cilvion Heymans, a Dutch national whose son, Ricardo, was a close friend of Petitioner Etienne Boerenveen's. Heymans told the undercover agent there was no cocaine available. In February 1986 the agent again approached Heymans and was again told there was no cocaine available. However, representing to the agent that he was very friendly with "the leader of the country", Heymans suggested another venture, offering to arrange for the use of "the Country of Suriname" as a refueling and transhipment point for cocaine en route from South America. In some half dozen telephone conversations between February 25, 1986 and March 20, 1986, Heymans and the agent arranged to meet in Miami on March 21, 1986, a meeting to which Heymans said he would bring "[t]he man that is ruling the country" without ever mentioning the name of that person.

On March 21, 1986, under a Suriname diplomatic passport with a Visa issued and entitled "Diplomatic" by the United States Embassy in Paramaribo and accompanied by Suriname's Prime Minister and their wives, Petitioner Etienne Boerenveen arrived in Miami to attend to certain consular matters, purchase machinery and equipment for Suriname's Fisheries Commission, and spend some leisure time with his wife and another couple.

Lured to a meeting with the undercover agent on March 21, 1986 by Heymans' representations they would be meeting with persons who wanted to invest in legitimate commercial ventures

in Suriname, Petitioner Boerenveen shortly found himself listening to a proposal to insure safe and secure refueling and transit stations in Suriname for the shipment of cocaine from South America against the payment of substantial monies. After they left the meeting, Petitioner Boerenveen, who had been responsible for authorizing Suriname's cooperation with the Drug Enforcement Administration in the Fall of 1985 to stop the use of Suriname as a way-station for cocaine from South America, berated Heymans for his deceit. On March 24, 1986, after completing part of his official business in Miami and having just been told by Heymans that the undercover agent already had an operation in Suriname, Petitioner Boerenveen again met the undercover agent, purposed to get the agent who was posing as an international drug smuggler within the territorial jurisdiction of Suriname. When the meeting ended on March 24, 1986, without final agreement or passage of money, Petitioner Boerenveen, Heymans and Heymans' son were arrested and subsequently indicted.

Invoking diplomatic immunity, Petitioner Boerenveen moved to dismiss the indictment prior to, during and at the conclusion of the trial. As well, prior to trial Petitioner Boerenveen moved to sever his trial from that of Heymans, supporting the motion with Heymans' affidavit which confirmed that Petitioner Boerenveen was unaware of the earlier communications between Heymans and the agent and the illicit purpose of the proposed transaction until the March 21, 1986 meeting and established Heymans' willingness to testify on behalf of Petitioner Boerenveen if they were tried separately.

The District Court denied both motions and that determination was affirmed without opinion.

Argument

THIS COURT SHOULD DETERMINE WHETHER A FOREIGN OFFICIAL WHO QUALIFIES FOR AND IS ISSUED A VISA TITLED "DIPLOMATIC", AND RELIES ON THAT STATUS IN TRAVELING TO THE UNITED STATES, IS ENTITLED TO IMMUNITY

In *United States v. Fitzpatrick*, 214 F.Supp. 425 (S.D. N.Y. 1963) the Court concluded that "once a diplomat is received, he is thereby entitled, without more, under the Law of Nations, to full diplomatic immunity."

Petitioner Etienne Boerenveen, an official of the Republic of Suriname who held a diplomatic passport and qualified for a diplomatic visa under 22 CFR Sect. 41.102, was issued a visa by the United States clearly imprinted and entitled "Diplomatic". 22 CFR Chapter l(e), Section 41.124(d)(2); see also, *United States v. Egorov*, 222 F. Supp. 106, 107 (E.D.N.Y. 1963). Relying on issuance of the diplomatic visa, Petitioner Etienne Boerenveen traveled to the United States from Suriname in the company of Suriname's Prime Minister, was permitted entry without submitting to the customary formalities attendant on entering the United States, including clearing customs and immigration checks.

The holding below that imprinting a classification symbol on a diplomatic visa nullifies the imprinted "Diplomatic" title on the visa is in utter conflict with 22 CFR 41.102(a) and 41.124(d)(2), and subjects a foreign official who relies on a diplomatic passport and a United States diplomatic visa to the caprice of the bureaucrat who imprints the diplomatic visa with a classification symbol the legal implications of which were unknown to both the foreign official and his government.

At a time in history when travel by and relations between representatives of Nations require that rules regulating diplomatic status be clear and immutable, this Court should

clarify the holding below by determining precisely what indicia of "acceptance and recognition of . . . diplomatic status" establishes conclusively that a representative of a foreign sovereign is entitled to the protection of diplomatic immunity. *United States v. Egorov*, 222 F.Supp. at 108.

Petitioner Etienne Boerenveen was eligible for and was issued a diplomatic visa by the United States. The obligation of the United States to recognize a status thus conferred and confirmed under regulations promulgated by its State Department, codified by its legislature, and recognized by the Law of Nations should be fully articulated by this Court.

THIS COURT SHOULD CONSIDER WHETHER ITS DECISIONS IN *UNITED STATES V. INADI*, 106 S.Ct. 1121 (1986) AND *BOURJAILY V. UNITED STATES*, 107 S.Ct. 2775 (1987) AND THE SIXTH AMENDMENT COMPULSORY PROCESS CLAUSE REQUIRE A MORE STRINGENT STANDARD FOR DECIDING SEVERANCE MOTIONS *THAN THE EXERCISE OF JUDICIAL DISCRETION*

In *United States v. Inadi*, 106 S.Ct. 1121 (1986), the Court concluded that unavailability of the declarant was not a prerequisite to admissibility of a conspirator statement under *F.R.E.* Rule 801(d)(2)(E), and in *Bourjaily v. United States*, 107 S.Ct. 2775 (1987) the Court held that independent indicia of reliability of a conspirator statement was not a prerequisite to admissibility, permitting the trial court to consider the conspirator statement itself as evidence of reliability.

These decisions and "the well-known abuse of discretion standard used to review a district court's refusal to sever", *United States v. Daly*, 756 F.2d 1076, 1079 (5th Cir. 1985), deprive one defendant in a conspiracy case of the Sixth Amendment right to compulsory process where, as here, the prosecution predicates virtually all of its proof against that defendant on conspirator

statements of a defendant jointly indicted and the trial court denies severance in the exercise of judicial discretion.*

In deciding that unavailability was not a prerequisite to admissibility of a conspirator statement, in *Inadi* this Court observed that "[t]he Compulsory Process Clause would have aided [the defendant] in obtaining the testimony of these declarants", suggesting a higher standard than abuse of discretion is required when a defendant seeks the testimony of an 801(d)(2)E) declarant for trial.

Here, Petitioner Boerenveen's right to compulsory process to contest the 801(d)(2)(E) statements which constituted the most damaging evidence against him was denied by the simple exercise of judicial discretion without a higher standard to comport with the Compulsory Process clause. Indeed, one Court noted that

> [t]he state argues that the granting *vel non* of a motion for severance is discretionary with the trial judge and that the burden of showing an abuse of such discretion is upon the appellant. Ordinarily this is a sound contention. But *the real issue* here *is the right to compulsory process*; and the question of *severance is involved only* incidentally *to the extent that severance may be the only expedient to protect such right*. In such a case the matter of discretion is extremely limited if not entirely eliminated." *Talavera v. State*, 227 So.2d 493, 495 (Fla.Dist.Ct. 1969), *aff'd in part, quashed in part, State v. Talavera*, 243 So.2d 595 (Fla. 1971) (Emphasis supplied)

This Court should grant *certiorari* to consider to what extent and under what circumstances its decisions in *United States v.*

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* During argument of the appeal, the United States Attorney conceded that the trial court erred in denying severance on the basis that Heymans' supporting affidavit "does not contain specific exonerative facts which would warrant a severance".

Inadi, 106 S.Ct. 1121 (1986), *Bourjaily v. United States*, 107 S.Ct. 2775 (1987) and the Sixth Amendment's Compulsory Process Clause require granting a severance to a defendant against whom 801(d)(2)(E) statements by a jointly indicted defendant will provide the most substantial evidence.

Dated: December 23, 1987

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 86-305-CR-ARONOVITZ

UNITED STATES OF AMERICA

v.

ETIENNE BOERENVEEN, RICARDO HEYMANS and CILVION HEYMANS

Defendants.

ORDER

THIS CAUSE came before the Court for hearing and oral argument, held on Friday, July 11, 1986, upon several motions filed by the defendants in the above-styled cause. The Court having considered the motions, the supporting and opposing memoranda of law, and the argument of counsel, it is thereupon

ORDERED AND ADJUDGED as follows:

1. That the appeal by defendant Boerenveen from the United States Magistrate's order, entered July 9, 1986, denying this defendant's Motion to Dismiss the Indictment on the Ground of Diplomatic Immunity be, and the same is, hereby DENIED for the reasons stated upon the record during the hearing on defendants' motions held on July 11, 1986.

2. That, as to the appeal by the defendants from the magistrate's order denying their Motions to Dismiss the Indictment on the Ground of Governmental Misconduct, the Court RESERVES RULING on this appeal pending resolution of the defendants' attempt to obtain the testimony of the government's confidential informant currently residing in the Hague, Netherlands.

The United States is, however, ORDERED to produce to the defendants the following properly discoverable materials:

1.) The amount, date and nature of each and every payment made by the United States, or any agency thereof, to the confidential informant known as Dick Statiene, in the course of the investigation which preceeded the instant criminal prosecution as well as in any other investigations in which this confidential informant has been employed by, or on behalf of, any agency of the United States.

2.) Any contingency agreements entered into between the United States, or any agency thereof, and the confidential informant employed in the investigation which resulted in the arrest and indictment of these defendants.

The above information is to be conveyed to counsel for the various defendants by 9:00 A.M. on Monday, July 14, 1986.

3. That, as to the Motion of defendant Ricardo Heymans to Take the Deposition of the Government's Confidential Informant in the Hague, Netherlands, the Court RESERVES RULING pending a report to the Court by the United States, to be given in open Court on Tuesday, July 15, 1986 at 9:00 A.M., concerning the availability of the deponent for either a voluntary deposition or one arranged under the applicable treaties in force between the Netherlands and the United States of America.

4. That the defendants' Motion that the Government Produce the two agents of the Drug Enforcement Agency whose testimony is sought by the defendants concerning their participation in drug enforcement activities in Suriname be, and the samae is hereby GRANTED.

5. That the Motions filed on behalf of each defendant, requesting leave of the Court to Adopt each and every Motion filed by other defendants in this cause be, and the same is, hereby GRANTED. Same rulings apply.

6. That the date set for the trial of this cause, WEDNESDAY, JULY 16, 1986, remains the date for the commencement of trial unless continued by the Court upon the joint Motion of all defendants.

DONE and ORDERED in Chambers at Miami, Southern District of Florida, this 14 day of JULY, 1986.

/s/ Sidney M. Aronovitz
SIDNEY M. ARONOVITZ
UNITED STATES DISTRICT JUDGE

Copy furnished to:

David M. Schenkman, Esq.
Bruce Fleisher, Esq.
Philip Gerson, Esq.
William Norris, AUSA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 86-305-Cr-ARONOVITZ

UNITED STATES OF AMERICA,
Plaintiff,

v.

ETIENNE BOERENVEEN, et al.,
Defendant.

ORDER

This cause, having come before the Court upon the defendants various motions, and the Court being fully advised in the premises, it is hereby

ORDERED AND ADJUDGED as follows:

1. The Motion For Discovery of Promises, Payments, and Inducements made to Dick Stoteine is hereby denied as Moot. At the hearing held on July 8, 1986, the Government announced that the informant received $5,000 as a reward and $8,500 as reimbursement for expenses.

It is hereby RECOMMENDED as follows:

1. The Motion To Dismiss Indictment and for Discharge on the Ground of Diplomatic Immunity be DENIED. The additional evidence presented at the July 8, 1986, hearing does not alter the opinion of the undersigned magistrate that Commander Boerenveen is not entitled to diplomatic immunity. His Visa application (the new evidence) does not show in any way that he was either a part of the mission or performing mission functions.

2. The Motion to Dismiss Indictment on Grounds of Governmental Misconduct (filed by Ricardo Heymans) on the issue of

the non-production of the informant be DENIED. The Government announced in open Court, on or about May 29, 1986, that the informant *could not* and *would not* appear at the trial. He was in Europe, suffering from leprosy, having undergone major amputation surgery. The Government's attempts to produce the informant, by contacting the D.E.A. agent contact of the infomant, informing the agent of the necessity of the appearance at trial of the informant, and offering to pay the informant's expenses, are reasonable under the circumstances. *United States v. Polland*, 479 F.2d 310 (8th Cir. 1973). It is further

ORDERED, Pursuant to Southern District of Florida Local Magistrate Rule 4(b), the parties may serve and file written objections to this recommendation with the Honorable Sidney M. Aronovitz, United States District Judge, within five (5) days after being served a copy of this Report and Recommendation.

DONE AND ORDERED in Miami, Florida, on this 9th day of July, 1986.

/s/ Samuel J. Smargon
SAMUEL J. SMARGON
UNITED STATES MAGISTRATE

cc: Phillip Gerson, Esq.
William Norris, AUSA
David Shenkman, Esq.
Bruce Fleischer, Esq.

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT OF
FLORIDA MIAMI DIVISION

CASE NO. 86-305-Cr-SMA

UNITED STATES OF AMERICA, :
:
Plaintiff, :
:
vs. :
:
ETIENNE BOEREN-VEEN, :
RICARDO HEYMANS and :
CILVION HEYMANS, :
:
Defendants. :

Courtroom 10
301 North Miami Avenue
Miami, Florida
Thursday, 3:00 p.m.
September 4, 1986

The above-entitled case came on for Special Hearing before The Honorable SIDNEY M. ARONOVITZ, United States District Judge, pursuant to Notice.

APPEARANCES:

WILLIAM NORRIS,
Assistant U.S. Attorney,
Attorney for Plaintiff.

PHILLIP GERSON, Esq. and
MYLES TRALINS, Esq.,
Attorneys for Defendant Boeren-Veen.

THE COURT: Thank you.

This Court has before it for consideration what was originally styled as the Defendant Boeren-Veen's motion to sever trial and which was referred to this Court by the United States Magistrate for ruling.

That motion has been renewed at this time, the motion to sever.

Also offered in conjunction therewith has been an affidavit attached to the renewed motion given by Cilvion Heymans, a codefendant herein.

The Defendant Boeren-Veen attempts to persuade the Court that the trial should be severed because the available testimony from Cilvion Heymans at a separate and later trial of Boeren-Veen would be the subject of a proper severance under Bird v. Wainwright, Tifford, the Prewett case, and others.

Having now heard the arguments of counsel, each respectively, and also having carefully considered the proffers made by each side as to the nature and type of evidence available, and having also recalled the substantial portions to two videotapes that had been previously reviewed by the Court and also being advised in the premises, I am going to deny the motion to sever the trial of Etienne Boeren-Veen, reserving the right to issue a written order setting forth more fully and thoroughly the grounds and the basis for the ruling.

Now, this denial is without prejudice to the Defendant Etienne Boeren-Veen at any point in time where it may be shown to be pertinent and proper in accordance with law, Bird v. Wainwright, and other cases, even during trial, that a severance is appropriate.

You can renew that motion at any time, including during trial.

But I believe frankly that under the circumstances in this case, the affidavit of Mr. Heymans is non-specific, it is extremely

generalized, it contains many conclusions and is not in itself exonerative, not within the tests of Bird and the progeny of Bird.

I feel that the Government has established a sufficient basis on proffer and the defendant, having been unable to produce evidence in the nature of testimony of Cilvion Heymans, when the oportunity has been offered, whereby the non-specific nature of the affidavit might have been addressed and cleared up by actual testimony, that I have no other choice than to go ahead, go to trial, deny the severance, then listen to the Government's evidence when it comes in.

After I have heard the Government's evidence, the Court will be in a better posture, in a better position, if the Defendant Etienne Boeren-Veen still wishes to renew the motion to hear it again during the trial, probably at the close of the Government's case or earlier, if indicated.

So that is the posture in which I will leave that matter.

Are there any questions?

If not, let me make this other observation: I have a lot of cases from time to time, as you know, wherein there are conspiracies alleged. This is not different.

In each instance everyone files a standard motion for a James hearing.

I wish to point out to you that James itself, and certainly none of its progency, mandates or requires the holding of a hearing. That is left to the discretion of the Court.

I consider the minimal proffer that the Government made as a James proffer, citing to the two videotapes to be adequate and sufficient in and of itself to constitute the substantial and independent evidence of the existence of a conspiracy among all three of the defendants, and that they each participated in it, including their words as spoken individually and applicable as to each, of course, and not to others, for this purpose, and that the words were uttered in furtherance of a conspiracy.

I will listen to the evidence during trial, see if the Government's testimony further supports it or doesn't.

87 1093

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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ETIENNE BOERENVEEN,

Petitioner,

– against –

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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App

No. 86-5964

IN THE

United States Court of Appeals

for the

Eleventh Circuit

OCTOBER TERM, 1987

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

ETIENNE BOERENVEEN,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

(September 23, 1987)

Before JOHNSON and ANDERSON, Circuit Judges, and ATKINS*, Senior District Judge.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.

*Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

No. 86-5964

IN THE

United States Court of Appeals

for the

Eleventh Circuit

OCTOBER TERM, 1987

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

ETIENNE BOERENVEEN,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

ON PETITION FOR REHEARING AND SUGGESTION OF REHEARING IN BANC

(Opinion September 23, 1987, 11 Cir., 198__, ____F.2d____).
(October 27, 1987)

Before JOHNSON and ANDERSON, Circuit Judges, and ATKINS*, Senior District Judge.

PER CURIAM:

(x) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested

*Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion of Rehearing in Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion of Rehearing In Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

file: 102714c, dd 49

(3)

No. 87-1093

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In the Supreme Court of the United States

OCTOBER TERM, 1987

ETIENNE BOERENVEEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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15 pp

QUESTIONS PRESENTED

1. Whether petitioner, who entered the United States on a visa identifying him as a "temporary visitor for pleasure," was entitled to diplomatic immunity.

2. Whether petitioner should have been tried separately from his co-conspirators.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1093

ETIENNE BOERENVEEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. Supp. App. A9) is noted at 830 F.2d 1130. The orders of the district court (Pet. App. A1-A8 and No. 110, Orig. App. 30-37)[1] are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1987, and a petition for rehearing was

[1] The appendix to the petition does not contain the oral ruling of the district court denying petitioner's motion to dismiss the indictment on grounds of diplomatic immunity. That transcript excerpt was appended, however, to the motion for leave to file a petition for a writ of habeas corpus that was filed in this Court by the Republic of Suriname on petitioner's behalf on September 4, 1987. *In the Matter of the Republic of Suriname, ex rel. Etienne Boerenveen,* No. 110, Orig. That motion raised the same diplomatic immunity issue that is presented in the instant petition. This Court denied the motion on November 30, 1987.

denied on October 27, 1987. The petition for a writ of certiorari was filed on December 26, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiring to travel in interstate or foreign commerce in aid of a racketeering enterprise, in violation of 18 U.S.C. 371 (Count 1), and of conspiring to import and to distribute cocaine, in violation of 21 U.S.C. 963 (Count 2). He was sentenced to concurrent terms of five years' imprisonment on Count 1, and 12 years' imprisonment on Count 2. The court of appeals affirmed without opinion (Pet. Supp. App. A9).

1. The evidence at trial showed that in February 1986, Drug Enforcement Administration (DEA) agent Kenneth Peterson telephoned Cilvion Heymans in Paramaribo, Suriname, to revive negotiations for the purchase of cocaine.[2] Heymans said that he could not get cocaine himself. He claimed, however, that he had connections with "the big leader of Suriname," and he offered Suriname "as a transit or harbor with the backing of the government" for a shipment of cocaine. Gov't C.A. Br. 3. In a subsequent conversation, Heymans offered to travel to the United States with the man who could offer safe passage for the cocaine. Heymans explained that the man "is the second in command in the country." In other conversations, Heymans stated that his contacts could provide harbors and airstrips. A meeting in Miami was arranged; Heymans agreed to travel to the United States on March 21 with two other persons and to

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[2] The pertinent facts are taken from the government's brief in the court of appeals.

return to Suriname on March 24. Gov't C.A. Br. 4. Heymans warned Peterson that the Surinamese official wanted a large operation that would generate millions of dollars.

In 1986, petitioner was a 21-year old Commander of the Army of Suriname and Chairman of the State Fishery Commission. In March 1986, the Government of Suriname asked the local United States Embassy to issue petitioner a diplomatic visa for official travel to this country. The Embassy refused to issue the visa because the Surinamese official making the request failed to disclose the purpose of petitioner's travel. The United States Embassy ultimately issued a diplomatic visa (see 22 C.F.R. 41.100) but assigned petitioner a "B-2" classification, identifying him as a "temporary visitor for pleasure" (22 C.F.R. 41.12). The Surinamese official then requested that petitioner be assigned an "A-1" classification, identifying him as a "public minister" (see *ibid.*). The Embassy refused that request, indicating that the United States would not issue a visa of that classification without knowing the purpose of the travel. See Gov't C.A. Br. 22-24.

Petitioner used the "B-2" visa to enter this country on March 21, 1986, with Cilvion Heymans and Cilvion's son Ricardo. Cilvion met with Peterson that day and told Peterson that he had brought petitioner with him. Heymans described petitioner as the "biggest man in the country," and he told Peterson that petitioner would give him "all the protection you need" if Peterson was willing to "pay the price." That evening, Peterson met with petitioner, who was accompanied by Cilvion and Ricardo Heymans. Petitioner discussed the runway and refueling facilities in Suriname and asked about fees and percentages. Gov't C.A. Br. 5. Petitioner demanded $1,000,000 per shipment. Three days later, Peterson met again with petitioner, Cilvion, and Ricardo. At that meeting they discussed the port facilities and trucks available to transport ether and cocaine. When

Peterson pressed petitioner for a clear explanation of who he was and why his guarantees of safety could be trusted, petitioner replied, "I am the second man up there in Suriname." Gov't C.A. Br. 6-7. Petitioner was then arrested in connection with the scheme to import multimillion dollar quantities of cocaine into this country. See Gov't C.A. Br. 3-7, 24.

After petitioner's arrest, the State Department's Associate Chief of Protocol of the United States made the following certification regarding petitioner's diplomatic status (Gov't C.A. Br. 25-26 (quoting GX 1)):

> A thorough search of the official records of the United States Department of State reveals that [petitioner and the Heymans] are not currently, and have not been in the past, recognized by the Department of State in any capacity which would entitle them to immunity from jurisdiction accorded diplomatic or consular personnel under applicable international law.

Thereafter, the Ambassador of Suriname met with officials of the State Department and claimed that petitioner was entitled to diplomatic immunity because he had entered the United States on a diplomatic passport for the conduct of official business (Gov't C.A. Br. 24-25). The State Department transmitted a diplomatic note unequivocally rejecting the claim of diplomatic immunity (*id.* at 25 (quoting GX 2)):

> Based upon a careful review of the representations of the Government of Suriname and the supporting documentation provided by Ambassador Halfhide, the Department has concluded that [petitioner] is not entitled, as a matter of international law, to immunity from the criminal jurisdiction of the United States. While certain courtesies may be extended to individuals traveling on diplomatic passports, such passports do not confer immunities under international law. Unless

> the concerned states have otherwise agreed, an individual is entitled to diplomatic privileges and immunities only as a consequence of his status as a diplomatic agent assigned to the diplomatic mission of the sending state to assume diplomatic responsibilities in the receiving State on a regular basis, or, having been assigned to assume such responsibilities in one country, is passing through another country either directly enroute to or returning from that assignment. [Petitioner] does not fall into either category. Nor is there a treaty or other international agreement between Suriname and the United States providing diplomatic privileges and immunities for government officials temporarily in the other's territory to engage in trade between the two states, promote investment, or otherwise conduct official business.

2. Shortly after his indictment, petitioner moved to dismiss the conspiracy charges on the ground that he was entitled to diplomatic immunity under the Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, Apr. 18, 1961, art. 31, 23 U.S.T. 3227 (Vienna Convention). The district court denied the motion to dismiss (Pet. App. A1-A5; No. 110, Orig. App. 30-37). First, the court affirmed the previous finding of a magistrate that petitioner "was not a part of a mission performing mission functions under the terms of the Vienna Convention" (Pet. App. A4; No. 110, Orig. App. 34). The court explained (No. 110, Orig. App. 34-35) that petitioner's "appointment to a mission and request for diplomatic status was neither properly notified to nor recognized by the United States." Second, the court observed (*id.* at 35-36) that, absent exceptional circumstances, it was bound to accept the determination of the State Department that petitioner was not entitled to diplomatic immunity. Finally, the court concluded (*id.* at 36-37) that, even if it was not bound by the State Depart-

ment's determination, there had been no abuse of discretion by the State Department warranting judicial intervention.

3. Prior to trial, petitioner moved for a severance from his two co-defendants, the Heymans. In support of his motion, petitioner presented an affidavit from Cilvion Heymans. That affidavit stated that Heymans would not testify on petitioner's behalf in a joint trial but that he would so testify if a severance were granted and Heymans were tried first. In the affidavit, Heymans claimed that petitioner was a friend of his son, Ricardo, and that petitioner knew nothing about the proposed narcotics venture prior to his visit to Miami. He claimed that it was sheer coincidence that he and petitioner flew to Miami on the same day and stayed in the same hotel. According to Heymans, he lured petitioner to the first meeting with Agent Peterson by telling petitioner that they were going to meet some men who wanted to invest in the cattle and lumber industry in Suriname. Heymans averred that petitioner first learned that the meeting concerned drugs when the subject was raised by Agent Peterson. The affidavit did not discuss the second meeting between Peterson, the Heymans, and petitioner.

After a hearing at which the district court viewed the videotaped meetings between Peterson and the three co-defendants, the district court denied the motion to sever. The court found that the affidavit submitted by co-defendant Cilvion Heymans "is non-specific, it is extremely generalized, it contains many conclusions and is not in itself exonerative." Pet. App. A7-A8. The court further noted that petitioner had failed to clear up the inadequacies in the affidavit by offering "to produce evidence in the nature of testimony of Cilvion Heymans." In conclusion, the court stated (3 Tr. 145):

> To the extent that anything contained in the aforementioned affidavit contains anything approaching

> the requisite specific exonerative fact, at this juncture, the Court is constrained to conclude that this evidence is overwhelmingly contradicted by the Government's proffer in open court as well as by the various tapes which this Court had occasion to review * * *."

4. On appeal, petitioner raised both the diplomatic immunity and severance claims. The court of appeals affirmed petitioner's convictions without opinion (Pet. Supp. App. A9).

ARGUMENT

1. Petitioner first contends (Pet. 4-5) that he was entitled to diplomatic immunity. The same issue was raised by the Republic of Suriname in a motion for leave to file a petition for a writ of habeas corpus on petitioner's behalf. No. 110, Orig. (filed Sept. 4, 1987). On November 30, 1987, this Court denied the motion. Petitioner makes no new arguments in support of his claim of diplomatic immunity here, and he alleges no conflict among the circuits. Accordingly, his request for review by writ of certiorari should likewise be denied.

As we noted in our brief in opposition to Suriname's motion, the determination of an alien's diplomatic status, made by the Executive Branch, is a political question. That determination goes to the heart of the President's constitutionally prescribed power to conduct foreign affairs and to his exclusive authority to "receive Ambassadors and other public Ministers." U.S. Const. Art. II, § 3. Thus, "the courts have generally accepted as conclusive the views of the State Department as to the fact of diplomatic status." *Abdulaziz* v. *Metropolitan Dade County*, 741 F.2d 1328, 1331 (11th Cir. 1984). See, *e.g.*, *In re Baiz*, 135 U.S. 403, 431-432 (1890); *Carrera* v. *Carrera*, 174 F.2d 496, 497 (D.C. Cir. 1949); *United States* v. *Fitzpatrick*, 214 F. Supp. 425, 433

(S.D.N.Y. 1963); *United States* v. *Coplon*, 88 F. Supp. 915, 920-921 (S.D.N.Y. 1950). In this case, the State Department expressly certified that petitioner is not recognized "in any capacity which would entitle [him] to immunity from jurisdiction accorded diplomatic or consular personnel under applicable international law" (GX 1). The State Department's determination accordingly resolves the matter. See Restatement (Revised) of the Foreign Relations Law of the United States § 461 reporters' note 1 (Tent. Draft No. 4, 1983); Restatement (Second) of the Foreign Relations Law of the United States § 73 comment i (1965).

Petitioner argues that he is entitled to diplomatic immunity because he was issued a "diplomatic" visa. The holder of a diplomatic visa, however, is not necessarily a diplomatic agent, and the State Department's issuance of a diplomatic visa does not, of itself, confer diplomatic immunity. Generally, a sending state issues to its diplomatic agent a diplomatic passport, and the receiving state gives him a diplomatic visa, but such passports and visas are sometimes issued as a courtesy to other persons, including foreign officials on official business in the United States, and are not sufficient evidence that the holder enjoys diplomatic privileges and immunities in the receiving state. See Restatement (Revised) of the Foreign Relations Law of the United States § 461, reporters' note 1 (Tent. Draft No. 4, 1983). See also, *e.g.*, *United States* v. *Arizti*, 229 F. Supp. 53 (S.D.N.Y. 1964) (denying immunity to career diplomat who entered the United States on a diplomatic visa). In this case, the Government of Suriname never sought to accredit petitioner as a head or member of its mission. Accordingly, he was admitted to this country solely as a "temporary visitor for pleasure." In these circumstances, his claim of diplomatic immunity is baseless.

2. Petitioner next contends (Pet. 5-7) that he should have been granted a severance from his two co-defendants,

the Heymans. He claims that where co-conspirator declarations will be introduced, severance motions are not subject to the discretion of the trial court; in that situation, he claims, the Compulsory Process Clause suggests that a "higher standard" is required. In support of this "higher standard," petitioner relies on *United States* v. *Inadi,* 475 U.S. 387 (1986), and *Bourjaily* v. *United States,* No. 85-6725 (June 23, 1987). There is no merit to that claim.

The law is well settled that the matter of severance is committed to the discretion of the district court. See Fed. R. Crim. P. 14 and advisory committee notes; *United States* v. *Fischl,* 797 F.2d 306, 313 (6th Cir. 1986); *United States* v. *Roth,* 736 F.2d 1222, 1228-1229 (8th Cir.), cert. denied, 469 U.S. 1058 (1984). A defendant is not entitled to a severance so that his co-defendant can testify on his behalf unless he makes a detailed proffer of testimony that is clearly and convincingly exculpatory in nature. Such a proffer is insufficient if it is conclusional or patently unworthy of belief. *United States* v. *Voss,* 787 F.2d 393, 401 (8th Cir. 1986), cert. denied, No. 86-5398 (Oct. 14, 1986); *United States* v. *Andrus,* 775 F.2d 825, 846-847 (7th Cir. 1985); *United States* v. *Cox,* 752 F.2d 741, 746 (1st Cir. 1985); *United States* v. *Johnson,* 713 F.2d 633, 640 (11th Cir. 1983), cert. denied, 465 U.S. 1081 (1984); *United States* v. *Marable,* 574 F.2d 224, 231 (5th Cir. 1978).

The district court properly found the proffer of Heymans' testimony in this case to be inadequate. At best, the proffer did nothing more than establish that petitioner did not have the intent to engage in drug smuggling prior to the first meeting with Agent Peterson. It did nothing to provide an innocent explanation for petitioner's subsequent conduct, which was the portion of the case against petitioner that was recorded on tape and played for the jury. Heymans' affidavit was simply silent as to that evidence, even though

Heymans was present during those meetings. Nor does the affidavit provide any explanation for petitioner's lack of any expression of surprise when it became clear that the meetings concerned narcotics, not investments in cattle and timber. For that reason, the district court clearly acted within its discretion in finding that Heymans' affidavit was insufficiently specific and insufficiently helpful to petitioner to require a severance.

Neither *Inadi* nor *Bourjaily* altered the test for granting a severance in a conspiracy case. Indeed, neither case is remotely pertinent to the question presented here. In *Inadi*, the Court held that the unavailability of an unindicted co-conspirator is not a prerequisite to the use at trial of his co-conspirator declarations. In so holding, the Court observed that the Compulsory Process Clause would have aided Inadi in obtaining the testimony of his unindicted co-conspirator if Inadi had desired to call the co-conspirator as a witness. 475 U.S. at 397. The Court never suggested, however, that it was altering the traditional test for determining when to sever the trials of indicted co-conspirators.

Nor does *Bourjaily* have any application here. In that case, the Court held that in establishing the admissibility of co-conspirator statements, the government may use the statements themselves to show by a preponderance of the evidence the existence of a conspiracy and the declarant's membership in it. There is no discussion of severance or the Compulsory Process Clause in *Bourjaily*.

In sum, the granting of a severance continues to rest in the sound discretion of the district court, as the courts of appeals uniformly hold. Petitioner has not shown that there was any abuse of that discretion here under the standards that apply when a co-defendant indicates that he would testify on behalf of a defendant if a severance is granted. Accordingly, further review of this issue is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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No. 87-1093

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ETIENNE BOERENVEEN,

Petitioner,

– against –

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

ARGUMENT

The Petition urges that this Court should require a more stringent standard than the trial court's exercise of judicial discretion in determining motions for severance in criminal prosecutions in light of *United States v. Inadi*, 475 U.S. 386 (1986) and *Bourjaily v. United States*, 107 S.Ct. 2775 (1987) and the Sixth Amendment's Compulsory Process Clause.

Opposing the Petition, the United States argues that "[t]he district court properly found the proffer of Heyman's testimony in this case to be inadequate" (*Brief in Opposition* at Page 9)

and that "[neither] *Inadi* nor *Bourjaily* altered the test for granting a severance in a conspiracy case" and that "neither case is remotely pertinent to the question presented here". (*Brief in Opposition* at Page 10)

As the Petition noted and the record confirms,

> "[d]uring argument of the appeal, the United States Attorney conceded that the trial court erred in denying severance on the basis that Heyman's affidavit 'does not contain specific exonerative facts which would warrant a severance' . " (*Petition* at Page 6, Footnote)

Thus, although irrelevant since Petitioner does not seek review of whether or not the trial court properly exercised its discretion under traditional standards for determining severance motions in conspiracy cases, the concession by the United States Attorney finds support in the record that, indeed, the trial court erred in denying Petitioner's severance motion applying the traditional standards.

Turning, then, to that which the Petition seeks to review, while concededly neither *Inadi* nor *Bourjaily* altered the test for determining a severance motion in a conspiracy case, contrary to the *Brief in Opposition* since both decisions substantially altered the prerequisites to admissibility of a conspirator statement under *F.R.E.* Rule 801(d)(2)(e) they implicate the Sixth Amendment's Compulsory Process Clause. Indeed, since *Inadi* and *Bourjaily* held that neither unavailability nor independent indicia of reliability are prerequisites to the admissibility of conspirator statements under *F.R.E.* 801(d)(2)(e), the only means of testing reliability of the conspirator statement admitted against a defendant is by examination or, as this Court observed in *Inadi*, cross-examination of the conspirator declarant.

Thus, as the Florida District Court observed in *Talavera v. State*, 227 So.2d 493, 495 (Fla.Dist.Ct. 1969), *aff'd in part, quashed in part, State v. Talavera*, 243 So. 2d 595 (Fla. 1971),

"the real issue here is the right to compulsory process; and the question of severance is involved only incidentally to the extent that severance may be the only expedient to protect such right."

CONCLUSION

This Court should grant the Petition for a writ of *certiorari* to consider to what extent and in what circumstances the decisions in *United States v. Inadi*, 475 U.S. 386 (1986) and *Bourjaily v. United States*, 107 S.Ct. 2775 (1987) and the Sixth Amendment's Compulsory Process Clause require modification of the traditional standard of the trial court's exercise of discretion in determining severance motions where conspirator statements will be offered under *F.R.E.* Rule 801(d)(2)(e).

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